NO. 44004-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CARA STINSON,

Appellant,

v.

THE STATE OF WASHINGTON and THE DEPARTMENT OF CORRECTIONS,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case concerns a former Department of Corrections (DOC) deckhand who alleges she contracted Methicillin-resistant Staphylococcus aureus (MRSA) as a result of working on a DOC ferry. However, neither Ms. Stinson nor her doctor knows how Ms. Stinson contracted (MRSA).

MRSA is a bacterium that causes infections in different parts of the body. Staph is a common bacterium that can live in our bodies. Infected surfaces such as doors or faucet handles may carry it as well. Plenty of healthy people carry staph without being infected by it. In fact, 25 to 30 percent of the population carries staph bacteria in their noses. A person may carry MRSA in their nose, touch their nose and then touch an abrasion on their body. MRSA has become so commonplace that 60 percent of all staph aureus infections in the community are now caused by MRSA.

The trial court properly granted summary judgment for three reasons. First, the trial court properly granted summary judgment on Appellant's seaworthy claim because she failed to present competent admissible expert testimony establishing factual proximate cause absent speculation on conjecture. MRSA is prevalent through out the community. Dr. Luteyn, Ms. Stinson's personal physician, is not an infectious disease expert. She does not know the mechanism of how Ms. Stinson became infected. She could not even say Ms. Stinson contracted

MRSA while working on the ferries. Appellant has failed to show and can not show, absent speculation, she contracted MRSA while working on a DOC ferry.

Second, the trial court properly granted summary judgment because Stinson did not prove factual causation concerning her Jones Act claim. Given the ubiquitous nature of MRSA, it is simply too speculative to draw a reasonable inference DOC's actions caused Stinson's infection.

Finally, the trial court properly granted summary judgment on Appellant's maintenance and cure claim because Ms. Stinson did not show her infection occurred, manifested, or was aggravated while she was working in the service of a DOC ferry.

Based on these reasons the trial court properly granted summary judgment and the ruling should be affirmed.

II. COUNTERSTATMENT OF ISSUES

1. Whether the trial court properly granted summary judgment on Ms. Stinson's seaworthiness claims when she failed to supply competent expert testimony to establish causation?

2. Whether the trial court properly granted summary judgment on Ms. Stinson's seaworthiness claim when she failed to show she contracted MRSA while working on a DOC ferry?

3. Whether the trial court properly granted summary judgment on Ms. Stinson's Jones Act claim when she failed to present competent admissible expert testimony to establish causation?

4. Whether the trial court properly granted summary judgment on Ms. Stinson's Jones Act claim when she failed to show she contracted MRSA while working on a DOC ferry?

5. Whether the trial court properly granted summary judgment on Ms. Stinson's claim for maintenance and cure when Appellant has failed to show her infection occurred, manifested, or was aggravated while she was working in the service of a DOC ferry.

III. COUNTER STATEMENT OF THE FACTS

Ms. Stinson is a former McNeil Island Marine Department Deckhand/Engineer.[1] She claims she contract MRSA while working for DOC as a deckhand on one of the vessels which transported employees and inmates to and from McNeil Island Correctional Facility. Neither Ms. Stinson nor her doctor knows how Ms. Stinson contracted MRSA.

A. MRSA Is Commonplace In The Community

MRSA is a bacterium that causes infections in different parts of the body. CP at 88, ll. 17-20. It is tougher to treat than most strains of staphylococcus aureus – or staph – because it is resistant to some commonly

[1] Ms. Stinson was terminated from that position due to inappropriate workplace behavior.

used antibiotics. CP at 88, 11. 17-20. Staph is a common bacterium that can live in our bodies. CP at 88, ll. 20-23. In fact, 25 to 30 percent of the population carries staph bacteria in their noses. CP at 88, 11. 20-23.

Like the common cold, MRSA is spread from person to person by direct skin-to-skin contact. CP at 89. Infected surfaces such as doors or faucet handles may carry it as well. CP at 76, ll. 10-18. A person can come in contact with MRSA in the community and carry MRSA in their nose without showing signs of infection for a considerable period of time. CP at 89.

In April 2008, Ms. Stinson had a MRSA infection. CP at 37-38. She was showering at home and found a pimple on her buttocks. CP at 37-38. She scratched it because it hurt. CP at 37-38. Over the next few days the pimple became bigger and extremely painful. CP at 37-38. Ultimately, she went to the hospital and was diagnosed with a MRSA infection.

Ms. Stinson readily admits she does not know how she contracted MRSA. CP at 54, ll. 11-12. Dr. Luteyn, Ms. Stinson's doctor, is not an expert in MRSA. CP at 77, l. 24 Dr. Luteyn does not know how Stinson became infected. CP at 79, ll. 10-12.

Dr. Luteyn does not know the actual mechanism of how Stinson developed MRSA. CP at 205, ll. 20-23. When asked ". . . Do you have

an opinion as to what the actual mechanism of transmission was in Ms. Stinson's case?" Dr. Luetyn answered, " No." CP at 205, l. 24.

Most importantly, Dr. Luteyn does not know whether Stinson came in contact with MRSA while on the ferry. CP at 80, l. 23 to 81, l. 4. During her deposition she was asked ". . . you can't render an opinion as to whether she came in contact with the MRSA while on the ferry itself as opposed to off the ferry?" She testified under oath "I can not render a statement that that's how she got it, . . ." CP at 80, l. 23 to 81, l. 4.

Dr. Luteyn admits there is no way to know how Stinson became infected. When asked ". . . is there is any way to know how she became infected?" Dr. Luetyn answered, "[t]here is never any way to know." CP at 79, l. 10-12.

The reason she does not know how or where Stinson contracted MRSA is straitforward. As noted by the State's expert, Dr. Marsh, who is board certified in infectious diseases, MRSA has become so commonplace that 60 percent of all staph aureus infections in the community are now caused by MRSA. CP at 89, ll. 5-10.

B. The McNeil Island Ferry System

The Department of Corrections McNeil Island Marine Department fleet was made up of five ferries and barges. CP at 83, l. 8. The ferries were used to transport offenders, DSHS secured confinement facility

employees, Special Commitment Center residents, and McNeil Island staff on and off the island. CP at 83, ll. 9-11. Any supplies that could not be carried by hand on the ferries were transported using the barges. CP at 83, ll. 11-12.

Each ferry was staffed with a Captain, a Deckhand/Engineer and two inmate line handlers. CP at 83, ll. 14-20. The Captain, a DOC employee, was primarily responsible for operating the ferry and overseeing the operations of the boat while it was underway traveling between the Steilacoom dock and the McNeil Island dock. CP at 83, ll. 14-20. The Deckhand/Engineer, a DOC employee, was responsible for a number of tasks while the boat was tied up at the dock, loading and unloading passengers, and while the ferry was underway. CP at 83, ll. 14-20.

When the boat was loading passengers, the primary duty of the Deckhand/Engineer was to monitor passengers as they board the boat and take an accurate count of passengers loading onto the ferry. CP 83, at ll. 20-23.

The ride to and from the island takes 18 to 22 minutes one way depending on weather. Upon landing, the Deckhand/Engineer along with the line handlers tie up the boat alongside the dock and secure the ramp

which is used by the passengers to load and unload the ferry. CP 84, ll. 4-9.

The Deckhand/Engineer was also responsible for conducting minor maintenance and clean up of the ferry during their shift. CP at 84, ll. 10-15. This would include picking up trash left by the passengers, cleaning up spills, monitoring pressure gauges in the engine room, tying up the boat during landing, overseeing cleaning the interior of the boat, and checking the engine room while the boat was underway, among other things. CP at 84, 11. 10-15.

Because of the length of the trip, the boats were not required to have restrooms per Coast Guard regulations. (46 C.F.R. §§ 177.30-5).[2] Full restroom facilities are available at the Steilacoom dock. CP at 84, ll. 19-20.

The Steilacoom dock is equipped with a bathroom with running water and soap. CP at 100, ll. 14-15. On the McNeil Island dock there were two sani-cans available for use as well. One sani-can was for inmate use only, the other for marine staff. CP 84, ll. 19-24. Both sani-cans were secured with padlocks. CP at 84, ll. 19-24. The sani-cans were equipped with hand sanitizer. CP at 84, ll. 19-24. The sani-cans were located next to the dock house where employees could retrieve additional cleaning

[2] Only one boat in the fleet is equipped with a restroom.

items if needed. CP at 84, ll. 19-24. These sani-cans were cleaned regularly by DOC staff or inmates. CP at 100, l. 9. There was also a restroom with running water and soap located on the causeway to the institution, which is within a short walking distance of the dock. CP at 100, ll. 11-13.

Additionally, Marine Department workers had access to hand sanitizer and rubber gloves on all the boats. CP at 85, 11. 1-5; 100, ll. 1-6. The boats also had spray disinfectant, which was used for cleaning the interior of the boats and GoJo, a citrus-based cleaning product, for the staff to clean their hands if needed. CP at 85, ll. 1-5. All DOC employees on the island were required to carry a personal protection kit, which contained sanitizing wipes as well. CP at 100, ll. 2-4.

IV. LAW AND ARGUMENT

The trial court properly granted summary judgment on all of Appellant's claims. Review of a trial court's ruling granting summary judgment is de novo. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 993 P.2d 259 (2000). A trial court properly grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

A. The Trial Court Properly Granted Summary Judgment Dismissing Appellant's Seaworthiness Claim Because Appellant Failed To Submit Competent Admissible Expert Testimony Establishing Proximate Cause

Appellant asserts the trial court erred in granting summary judgment on Appellant's seaworthy claim. This assertion is without merit because Ms. Stinson failed to submit competent admissible expert testimony establishing proximate cause.

To establish a claim for unseaworthiness, a seaman must establish:

> (1) The warranty of seaworthiness extended to him and his duties; (2) his injury was caused by a piece of the ship's equipment or an appurtenant appliance; (3) the equipment used was not reasonably fit for its intended use; and (4) the unseaworthy condition proximately caused his injuries (citations omitted).

Ribitzki v. Canmar Reading & Bates, Ltd. Partnership, 111 F.3d 658, 664 (9th Cir. 1997).

Just because a seaman is entitled to a vessel reasonably fit for its intended purpose, this does not mean that they are entitled to a vessel and equipment perfect in all respects.

> [T]he standard is not perfection but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 560, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960). Neither the newest nor the best equipment is required,

only equipment that is suitable for its intended use. *Nelson v. Stellar Seafoods, Inc.*, 2006 WL 3544607 (W.D. Wash). Examples of unseaworthy conditions are: insufficient or incompetent crew, defective vessel equipment, unreasonably slippery decks, and unsafe ladders.

To prevail on an unseaworthiness claim, a seaman must also prove the alleged unseaworthy condition proximately caused his injury. *Ribitzki*, 111 F.3d at 664. The Appellant must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was a direct or reasonably probable consequence of the unseaworthiness. *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347 (5th Cir. 1988).

Cause in fact "does not exist if the connection between an act and the later injury is indirect and speculative." *Estate of Bordon v. Dep't of Corrections*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005); *Miller v. Likins,* 109 Wn. App. 140, 146-47, 34 P.3d 835 (2001); *Ma'ele v. Arrington,* 111 Wn. App. 557, 564, 45 P.3d 557 (2002).

Expert testimony is generally required to establish admissible evidence of a medical diagnosis and causation. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). *See also* ER 701 (limiting the scope of permissible lay opinions) and ER 702 (expert opinion). To

establish medical causation the Appellant must present admissible and competent expert testimony on the issue of causation. CR 56(c). Before an expert may testify, they must be qualified as an expert and their testimony is then limited to their field of expertise. *Queen City Farms v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 882 P.2d 703 (1994).

Turning to the facts of this case, the trial court properly granted summary judgment on Appellant's seaworthiness claim because the Appellant did not establish factual proximate cause. Ms. Stinson allegations create an issue of fact over how clean the vessels were. While DOC denies Stinson's allegations concerning the cleanliness of the vessels, the debate is frankly irrelevant because she did not establish proximate cause.

As detailed in the declaration of Dr. Marsh, who is board certified in infectious diseases, it is entirely speculative to say Ms. Stinson contracted MRSA as a result of her job duties. CP at 87-89.[3] It is speculative because MRSA is so commonplace that 60 percent of all staph aureus infections in the community are now caused by MRSA. CP at 89, ll. 5-10.

Infected surfaces such as doors or faucet handles among other things carry staph. CP at 76, ll. 10-18; 87-89. A person can contract MRSA

[3] Dr. Ayars who performed an IME for the Department of Labor and Industries also notes that MRSA is ubiquitous and also concluded that Stinson's infection was not work related. CP at 97.

anywhere in the community, carry MRSA in their nose, touch their nose and then touch an abrasion on their body. CP at 89, ll. 5-10. In short, Stinson could have come in contact with MRSA anywhere in the community and carried MRSA for a considerable period of time without showing signs of infection. CP at 89.

Appellant's reliance on Dr. Luteyn's opinion on causation is misplaced because the doctor lacks the requisite expertise and factual foundation to offer any opinions concerning causation. There is no evidence in the record establishing Dr. Luteyn credentials and Dr. Luetyn admits that she is not an expert in MRSA. CP at 77, l. 24. This alone is fatal to Appellant's claim.

Appellant attempts to bolster Dr. Luteyn's opinion by submitting her mother's self-serving statements about "cleanliness" are also misplaced. This is not a case were medical facts are observable by a layperson's senses and describable without medical training. *Miller v. Jacoby*, 145 Wn.2d 65, 72-73, 33 P.3d 68 (2001).

In addition to Dr. Luteyn's lack of expertise concerning infectious diseases, Dr. Luteyn's opinion lacks factual support. The use of "magic words" such as "more probably than not" do not render opinions admissible either. *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990). The statement that something is more probable than something

else, without factual support from some source other than personal belief, is nothing but a conclusion, which is not sufficient to overcome summary judgment. *Watters v. Aberdeen Recreation*, 75 Wn. App. 710, 879 P.2d 337 (1994); *Kristjanson v. City of Seattle,* 25 Wn. App. 324, 606 P.2d 283 (1980).

Dr. Luteyn admits she does not know how Stinson became infected in this case. CP at 79, ll. 10-12. She also does not know the mechanism of how Stinson developed MRSA. CP at 205, ll. 20-23. Ms. Stinson first noticed a pimple on her buttocks in her home, not work.

MRSA is more prevalent in certain locations such as athletic facilities, prisons, daycare, and hospitals. However, the fact that someone goes to one of these locations and later develops a MRSA infection is not proof that the infection was the result having been at such a site. The means for transmitting MRSA bacteria through human contact are so numerous as to be imponderable.

The trial court also properly granted summary judgment because Dr. Luteyn's opinions are speculative. Dr. Luteyn's opinions on proximate cause are speculative because they are simply conclusions with no objective factual support. As stated in *Miller*:

> [T]o survive summary judgment, the plaintiff's showing of proximate cause must be based on more than mere conjecture or speculation.at trial.'

Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001).

Dr. Luteyn's opinion is based solely on conjecture. She is not an expert on infectious diseases, does not know how Stinson became infected and can not even say whether Stinson even came in contact with MRSA while working on a DOC ferry. CP at 80, l. 23 to 81, l. 4.

As such, the trial court properly granted summary judgment because Appellant failed to submit any competent admissible expert testimony establishing Ms. Stinson contracted MRSA as a result of working as a seaman on a DOC ferry.

B. The Trial Court Properly Granted Summary Judgment Dismissing Appellant's Jones Act Claim Because Appellant Failed To Submit Competent Admissible Expert Testimony Establishing Proximate Cause

The Jones Act, 42 U.S.C. § 688(a), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

Although the Jones Act is a federal statute, the state of Washington adopted its provisions and waived sovereign immunity to allow WSF employees employed as seamen to sue the State for negligence for injuries

occurring during the course of their employment aboard State owned and operated vessels.

> The State consents to suits against the Department Of Transportation by seamen for injuries occurring upon vessels of the department in accordance within the provisions of Section 688, Title 46, of the United States Code. The venue of such actions may be in the Superior Court for Thurston County or the county where the injury occurred.

RCW 47.60.210.

The elements of a Jones Act negligence claim are no different from the elements necessary to prove a common law negligence claim: duty, breach, notice and causation. The elements of a Jones Act negligence claim are: duty, breach, notice and causation. *See Matson Nav.Co. v. Hansen*, 132 F.2d 487, 488 (9th Cir. 1942); *Ribitzki*, 111 F.3d at 662.

The mere occurrence of an injury does not establish liability. *Marvin v. Central Gulf Lines, Inc.*, 554 F.2d. 1295, 1299 (5th Cir) ("The burden of proving negligence . . . in a Jones Act case is a light one, but even at sea injury does not presuppose negligence"), *cert. denied*, 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 782 (1978). *See also Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994).

To recover on his Jones Act claim, a seaman must establish that the State was negligent and that this negligence was a cause, however

slight, of his injuries. *Ribitzki*, 111 F.3d at 662 *quoting Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993). While the burden of establishing proximate cause in a Jones Act claim is different than a traditional tort, the claim must not be based on speculation and conjecture. Appellant's claim still must not be based on speculation and conjecture. Summary judgment is appropriate in a Jones Act claim when the causal link between the alleged negligence and the Appellant's injury is too speculative to draw a reasonable inference the alleged negligence played a part in the seaman's injury. *Abshire v. Gnots-Reserve, Inc.*, 929 F.2d 1073 (5th Cir. 1991).

Here, the trial court in this case properly granted summary judgment on Ms. Stinson's Jones Act claim for the same reasons it granted summary judgment on the seaworthiness claim. As discussed in the last section, Dr. Luteyn is not competent to offer testimony on how Stinson became infected. She does not know how Stinson became infected and could not even say Stinson came in contact with MRSA on a DOC vessel.

As such, the trial court properly dismissed Appellant's Jones Act claim because it is too speculative to claim DOC's actions caused or played a part in seaman's injury when (1) MRSA is frequently encountered in human interaction (2) it is unknown how Stinson became infected (3) it is unknown when Stinson became infected and (4) Dr.

Luteyn could not say Stinson contracted MRSA on the vessels. CP at 79, l. 10-12.

C. The Trial Court Properly Dismissed Appellant's Maintenance And Cure Claim Because She Failed To Show That Her Injury Occurred, Manifested, Or Was Aggravated While In The Ship's Service

Under general maritime law, the injured seaman can seek an award for unpaid maintenance and cure. "Maintenance" is the living allowance for food and lodging while "cure" is the right to necessary medical services. *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 528, 58 S. Ct. 651, 82 L. Ed. 993 (1938). A seaman is also entitled to unearned wages for the period from the onset of the injury or illness until the end of the voyage. The right to maintenance and cure extends to the point of maximum medical cure. *Vaughan v. Atkinson,* 369 U.S. 527, 531, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962).

A seaman must establish his or her right to maintenance and cure by a preponderance of the evidence. *Mai v. Am. Seafoods, Co.*, 160 Wn. App. 528, 538, 249 P.3d 1030 (2011). A seaman establishes the right to maintenance and cure by proving the four following elements by a preponderance of the evidence: 1) engagement as a seaman; 2) that the illness or injury occurred, manifested, or was aggravated while in the ship's service; 3) the wages to which the person is entitled; 4) the

expenditures for medicines, medical treatment, board, and lodging. *Mai,* 160 Wn. App. at 538, (citing *Johnson v. Cenac Towing, Inc.*, 468 F. Supp. 2d. 815, 832 (E.D.La. 2006)).

Here, Appellant's claim for maintenance and cure fails because she cannot show she was engaged as a seaman when the infection occurred, manifested, or was aggravated. There is no evidence in the record when Ms. Stinson came in contact with MRSA or was colonized with MRSA. The first time Stinson even became aware of any issue was when she noticed a pimple on her buttocks after taking a shower at home, not while she was engaged in work as a seaman.

Given Ms. Stinson cannot establish the time, place, and manner of how she became infected she cannot show by a preponderance of the evidence that her illness or injury occurred, manifested, or was aggravated while in the service of a DOC ferry. As such, the trial court properly dismissed this claim as well.

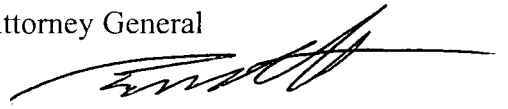
V. CONCLUSION

The Pierce County Superior Court properly granted summary judgment in favor of the State of Washington and Department of

Corrections. The order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of March, 2013.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I certify that I had served a copy of the Brief of Respondents on appellant's counsel of record on the date below by having it served by e-mail and US Mail on the office of:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of, 2013, at Tacoma, Washington.

Jodi Elliott

JODI ELLIOTT, Legal Assistant